

# **The Report of the Attorney Discipline Board to the Michigan Supreme Court Regarding Proposed Michigan Standards for Imposing Lawyer Sanctions**

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**(Submitted in June 2002 by the Attorney Discipline Board)**

## **I. Introduction & Summary**

On June 27, 2000, the Michigan Supreme Court decided *Grievance Administrator v Lopatin*, 462 Mich 235; 612 NW2d 120 (2000), and adopted the American Bar Association's Standards for Imposing Lawyer Sanctions on an interim basis. The Attorney Discipline Board was directed to "explore the development of permanent Michigan standards for imposing lawyer sanctions . . . [and to] report its proposed Michigan standards to [the] Court within two years . . . ." 462 Mich at 238 n 1. The Court explained that use of the ABA Standards would further the purposes of attorney discipline by:

- helping to identify the appropriate factors for consideration in imposing discipline;
- establishing a framework for selecting a sanction in a particular case;
- promoting consistency in discipline;
- producing reasoned decisions; and,
- facilitating appellate review.

462 Mich at 238-239.

As is set forth more fully below, the Board approached its task first by disseminating the ABA Standards and pertinent portions of the *Lopatin* decision along with a checklist for use by hearing panels and parties (see "ADB Worksheet" tab in separately bound "Background Materials"). Consistent application of the Standards led to various observations by the Board and its staff, which raised certain questions (see section III of this report outlining the scope of the Board's work) and led to the formulation of the methodology employed to accomplish the task of drafting proposed standards (see section II of this report).

The Board proposes, and recommends that it be authorized to adopt, Michigan Standards for Imposing Lawyer Sanctions (attached). Although based substantially on the ABA Standards, various modifications have been incorporated (see attached blacklined version of the Michigan standards with deletions from the ABA Standards ~~struck through~~ and additions double underlined). Where necessary, these modifications are intended to improve readability and clarity. And, a new Standard (3.1) was added to guide users through the process of applying the Standards. More substantive changes were also made. While relatively few in number, these changes were considered to be significant and necessary to align the Standards with ranges of discipline articulated in Michigan precedent. Examples in this area include deletion of the requirement of injury for wilful misappropriation, and recalibrating standards to recommend reprimands less often in cases of negligent mishandling of client property and where dishonest conduct is involved.

Adoption and use of the Michigan Standards will promote consistency, proportionality, and articulation, goals outlined in the preface to the ABA Standards and in the Court's opinion in *Lopatin*. Moreover, adoption of these standards, with commentary based upon pertinent Michigan cases decided by the Court and the Board, will provide hearing panels, members of the bar, and the public with a better understanding of the nature and purpose of our discipline system. However, the framework provided by the standards proposed in this report will not, in the Board's opinion, achieve these goals without a Michigan-based commentary. With the submission of these standards, the Attorney Discipline Board has completed the first part of this project and looks forward to embarking on the second phase – a comprehensive review of Board and Court cases in Michigan, and from other jurisdictions if appropriate, in the field of lawyer discipline and the drafting of commentary to the proposed Michigan Standards.

## **II. Methodology**

After the Court issued its opinion in *Lopatin*, on June 27, 2000, the ADB mailed a "Hearing Panel Alert," on July 12, 2000, to all hearing panel members. The Alert summarized and enclosed pertinent parts of *Lopatin*, and informed panel members of the necessity of applying the ABA Standards in each case. Permission from the ABA to reproduce the text of the Standards was obtained and arrangements were made with the State Bar for such reproduction. Copies were made available to all new hearing panel members, and any existing panelists who needed them. Subsequent mailings and training sessions also discussed the Standards. A "checklist" following *Lopatin's* directions for applying the Standards was devised by the Board and mailed to every hearing panelist with a memorandum explaining that it would be sent to the panel and parties at the commencement of each new discipline proceeding (a copy accompanies this report in the separately bound Background Materials, under the "ADB Worksheet" tab). All of this laid the foundation for later evaluation of particular standards during the process of applying them.

In the course of drafting, and preparing to draft, the attached proposed Michigan Standards the Board:

- Reviewed critiques of the ABA Standards – See, e.g., Leslie C. Levin, *The Emperor's Clothes and Other Tales About the Standards for Imposing Lawyer Discipline Sanctions*, 48 AM. U.L. REV. 1, 30 n 138 (1998), and Barrie Althoff, *Lawyer Disciplinary Sanctions*, Professional Lawyer 2001 Symposium Issue (ABA Center for Professional Responsibility) (both articles are reproduced in the Background Materials);
- Queried discipline counsel in other jurisdictions via the National Organization of Bar Counsel (NOBC) listserv;
- Held three open meetings, inviting all AGC counsel and counsel who regularly represent respondents, to discuss various questions, including those posed in section III of this report (below);

- Assembled an advisory group consisting of Robert Agacinski<sup>1</sup>, John T. Berry<sup>2</sup>, Robert Edick<sup>3</sup>, Lynn Helland<sup>4</sup>, Marcia Proctor,<sup>5</sup> and Cynthia Thomas<sup>6</sup>; and,
- Learned from applying the ABA Standards in discipline cases after *Lopatin* was handed down. A comprehensive review of the Standards in their entirety yields useful insights, but the attempt to apply certain text to a concrete set of facts may illuminate issues not otherwise apparent. Thus, the Board has attempted to draw on recent experience with the Standards. Also, the Board has concluded that Michigan standards must be stable enough to afford guidance and promote consistency, yet sufficiently dynamic so as to continue to accurately reflect the decisions of the Board.

The Board also gratefully acknowledges the helpful comments of Mary Devlin, Regulation Counsel, ABA Center for Professional Responsibility, and Thomas K. Byerley, Director of Professional Standards, State Bar of Michigan.

### III. Scope

The Board considered the question whether the ABA Standards should be used as a model for Michigan standards. Early on, the Board tentatively decided to approach its task with the following working hypotheses: (a) the ABA Standards adequately set forth ranges of discipline largely consistent with those found in Michigan precedents; (b) there is value in following a model widely adopted and cited by other jurisdictions; and (c) Michigan modifications could be achieved within the framework of the ABA Standards without significant undesirable consequences. Accordingly, the following questions were considered:

1. Is the approach, structure, sequence and process of applying the ABA Standards optimal? Or, can improvements be made? For example, is the Standards'

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<sup>2</sup> Mr. Berry is currently the State Bar of Michigan's Executive Director. He was chief disciplinary counsel in Arizona and Florida, has served on numerous ABA consulting teams, is a former National Organization of Bar Counsel (NOBC) President and currently serves as NOBC's liaison to the ABA House of Delegates. He was a member of the ABA Joint Committee on Professional Sanctions which drafted the ABA Standards).

<sup>3</sup> The Deputy Grievance Administrator.

<sup>4</sup> Mr. Helland is a hearing panelist and an Assistant United States Attorney.

<sup>5</sup> Ms. Proctor is General Counsel to Butzel Long (where she practices in the areas of professional responsibility and risk management), is the President of Professional Responsibility Counselors (an organization of Michigan practitioners in the areas of disciplinary law, and professional responsibility and liability), and was formerly State Bar of Michigan General Counsel and on the staff of the ABA Center for Professional Responsibility.

<sup>6</sup> Ms. Thomas is a hearing panelist and a partner at the firm of Honigman, Miller, Schwartz & Cohn.

categorization of types of misconduct (by duties to clients, the public, the profession, the legal system) the best approach?

2. Are the definitions of “intent” and “knowledge” sufficiently helpful to draw distinctions regarding a lawyer’s mental state? If not, what terms might be better?
3. Is the factor of “actual or potential injury” used appropriately?
4. Should Michigan standards be more specific regarding the length of suspensions recommended?
5. Should the standards apply to discipline by consent (i.e., plea agreements)?
6. Should Michigan standards follow the ABA Standards and refer to cases in which admonition would generally be appropriate?
7. Should any of the aggravating or mitigating factors in ABA Standard 9.0 not be present in Michigan standards? Are there any not present in the ABA Standards that should be set forth in Michigan standards?
8. Are there differences between the ABA Standards and Michigan precedent? And, if so, how should such differences between be handled? That is, assuming the ABA Standards are used as a model, should certain standards be adjusted? Or, should caselaw be revisited? What will be the role of the standards *vis a vis* precedent of the Board and the Court?
9. Who should adopt and revise the Michigan standards?

Ultimately, the answers to these questions persuaded the Board that it was not necessary or advisable at this time to jettison the ABA structure and proceed to draft entirely new standards, perhaps premised on a rule-by-rule cataloguing of misconduct found in the Michigan Rules of Professional Conduct. Rather, the ADB has concluded that Michigan standards based on the ABA model can achieve the objectives the Court announced in *Lopatin*. Moreover, such standards can co-exist with, and help to elucidate and publicize, precedent of the Court and the Board in a manner that will be helpful to the parties and the hearing panels, as well as the Board and the Court.

#### **IV. Conclusions & Recommendations**

The following answers to the questions set forth above provide an overview of the Board’s conclusions on key questions. More detailed discussion as to these points and specific modifications to the ABA Standards may be found in the Drafting Notes appended to this report.

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**Standards' categorization of types of misconduct (by duties to clients, the public, the profession, the legal system) the best approach?**

The obvious alternative to the framework of the ABA Standards is to proceed rule-by-rule to catalogue the various types of misconduct and recommended discipline therefor. This approach was briefly considered by the Board, but rejected in favor of the ABA approach for various reasons.

First, there is value to the profession and its regulatory agencies in following a format widely adopted in other jurisdictions. One of the goals of the ABA Standards is to promote "consistency in the imposition of disciplinary sanctions for the same or similar offenses within and among jurisdictions." ABA Standard, 1.3. In the Conference of Chief Justices' January 21, 1999 National Action Plan on Lawyer Conduct and Professionalism (CCJ Nat'l Action Plan), it is recommended that: "Disciplinary agencies should use available national standards to ensure interstate consistency of disciplinary sanctions." CCJ Nat'l Action Plan, § II, D, 3, p 35. The comment to that recommendation states that sanctions should be consistent "both within and across jurisdictions," and that "[t]he ABA Standards for Imposing Lawyer Sanctions provide criteria for evaluating the severity of conduct and imposing appropriate sanctions." *Id.*, p 36.

Second, the ABA Standards focus on the most frequent ethical violations and the most fundamental obligations of a lawyer. This is logical because the Standards were drafted after an examination of all reported lawyer discipline cases from 1980 to June 1984 and a study of all such cases from January 1974 to June 1984 in eight jurisdictions.<sup>7</sup> See ABA Standards, p 2, Methodology. As the body of discipline law grows, and more decisions on heretofore unusual violations become available, the better will the Board and others be able to detect and declare ranges of discipline with some sense of proportionality and experience. Thus, Michigan, other jurisdictions, and the ABA, are able to consider amending or adding to the Standards at appropriate times. At this point, however, the Standards still cover the most significant and frequently recurring types of misconduct, and they appear sufficiently adaptable to accommodate growth and revision.

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<sup>7</sup> Apparently, many unreported decisions were also reviewed. See ABA Standards, p 2, Methodology, n 10. Of course, the age of these cases may necessitate a review of the recommended sanctions in light of more recent precedent. And, it seems clear that the ABA Joint Committee on Professional Sanctions must have made some qualitative judgments, i.e., determining from its review of the cases what decisions fell within and outside the norm. However, the ADB has concluded that, by and large, the ABA's recommended sanctions do adequately state ranges considered appropriate in Michigan. However, as has been stated elsewhere in this report, review of the Standards by the Board is a continual process. Problems or dissonances may yet emerge, most likely when close consideration of a particular standard is forced by a specific case.

Finally, the ABA Standards provide a helpful, workable format which can be readily adapted and improved. For example, the proposed Michigan Standard 3.1 expressly directs readers to an appendix cross-referencing the Rules of Professional Conduct with the Standards in an effort to eliminate guesswork as to which standard is applicable. To facilitate this shift in focus from the “duty violated” to the cross-reference, and to address other concerns (please see Drafting Notes to Standard 3.0), the first of the four factors to be considered in imposing discipline has been modified: instead of “duty violated,” proposed Michigan Standard 3.0 speaks of “the nature of the misconduct.” The catch lines which refer to duties to clients and others have been retained, however, because these provide a useful organization of the standards. But, the inquiry as to which duty has been violated does not inevitably lead to the applicable standard (see Drafting Notes). The Board believes that the modifications to Standard 3.0 will eliminate a confusing step, and that new Standard 3.1 will assist users in applying the standards.

**2. Are the definitions of “intent” and “knowledge” sufficiently helpful to draw distinctions regarding a lawyer’s mental state? If not, what terms might be better?**

Generally, “intent” “is the mental resolution or determination to do” something, Black’s Law Dictionary (7<sup>th</sup> ed, 1999), p 813, and “knowledge” is an “awareness or understanding of a fact or circumstance.” *Id.*, p 876. Some other definitions may cause these two concepts to overlap. The Standards’ definitions seem faithful to the foregoing definitions and drawn with the determination to avoid overlap. The Standards define “intent” as “the conscious objective or purpose to accomplish a particular result,” and define “knowledge” as “the conscious awareness of the nature or attendant circumstances of the conduct but without the conscious objective or purpose to accomplish a particular result.” Experience with the application of the ABA Standards so far has not revealed significant problems with these definitions.

**3. Is the factor of “actual or potential injury” used appropriately?**

This question is discussed at some length in the drafting notes to the “Definitions” section of the standards. Briefly, the Board concluded that the ABA definition of “potential injury” was confusing and appeared to place a burden on the AGC to show that harm probably would have occurred but for some intervening act. Under Michigan and national caselaw, damage is not an element of a misconduct charge. Accordingly, the definition of “potential injury” has been modified (please see blacklined draft, Definitions). Also, in various specific standards, the elements of injury or potential injury were deleted. See, e.g., Standard 4.11 (knowing conversion of client property).

**4. Should Michigan standards be more specific regarding the length of suspensions recommended?**

Under the ABA Standards, Michigan caselaw, and MCR 9.106, a wide range of possible suspensions is available.<sup>8</sup> The ADB believes that caselaw and commentary can and should be the means to convey the circumstances and factors which differentiate one suspension case from another. See drafting note to Standards 3.0 and 3.1 (discussing the likely impossibility of prospectively assigning the appropriate level of discipline for every permutation of lawyer misconduct which could arise and further discussing the important role of precedent of the Court and the Board in refining the suspension recommendation and in fashioning proportionate discipline).

The ABA Standards and proposed Michigan Standards both require a heightened degree of articulation as to the bases for the sanctions decision. This contribution alone should aid in the development of useful precedent. In *Grievance Administrator v Robert H. Golden (After Remand)*, No. 96-269-GA (ADB 2001), lv den 465 Mich 1316 (2002), the Board explained how the growth of discipline precedent would be of benefit:

As each panel weighs the nature of the misconduct and the attendant circumstances in light of precedent, proportionality, and the stated objectives of the discipline system, caselaw – now extant within the framework of the Standards – will accumulate and thereby delineate the appropriate range of discipline for like cases.

Accordingly, the Board's proposed Michigan Standards assume that commentary and Court and Board precedent will afford critical guidance in applying the Standards. The Board envisions the drafting of commentary to be an essential second phase of the standards project which will require the Board to devote significant resources to its completion. However, the benefits include clarification, illustration, and more specific guidance as to the appropriate length of a suspension and other aspects of assigning the appropriate level of discipline. The commentary will, in part, restate Michigan precedent within the framework of the Standards.

None of the foregoing would preclude the possibility of eventually adopting text which sets forth criteria in some instances for determining the length of a suspension. It is possible that, with further reflection and the development of caselaw in certain areas, consideration of certain factors may recur with such consistency that they effectively crystallize into standards and should be restated as such in the "black letter."

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<sup>8</sup> In Michigan, suspensions may range from 30 days upward. MCR 9.106. Although the rules prescribe no upper limit, suspensions greater than five years have not been employed in practice.

**5. Should the standards apply to discipline by consent (i.e., plea agreements)?**

The proposed Michigan Standards follow the practice of various other jurisdictions and provide that they are applicable to discipline by consent. With consent disciplines approaching 50% of the total number of discipline orders issued annually (48% in 2001 and 46% in 2000), application of the Standards only in contested cases would quite possibly undercut the purposes of standards as announced in the *Lopatin* decision. It is difficult to explain to the public and the profession why the level of discipline in one group of cases should be measured against standards designed to produce consistency within the context of fair departures for individual circumstances whereas another group need not even make reference to such standards. (This point is discussed further in the drafting notes to Standard 1.3.)

**6. Should Michigan standards follow the ABA Standards and refer to cases in which admonition would generally be appropriate?**

This question is discussed at length in the drafting notes to proposed Standard 2.6. There are sound arguments for the adoption of standards covering the imposition of admonitions. However, after initially drafting admonition standards, the ADB has not included them in the text of its proposed standards. The Board was persuaded that, given the Attorney Grievance Commission's sole authority to impose admonitions, the ADB should not, and likely could not, adopt such standards absent express authorization by the Court. Moreover, the ADB does not have the experience the AGC has with regard to admonitions. The AGC alone sees cases from intake to the stage of dismissal, admonition, formal proceedings or other disposition. It is in a better position to determine what the appropriate admonition standards should be – assuming the Court decides that admonitions should be covered by standards at all. Should the Court wish to adopt admonition standards, direct the AGC to adopt them, or direct the Board to adopt them, it would be possible for any such standards to be jointly published (on the ADB website and in hard copy) so that users could find all of the standards in one place.

**7. Should any of the aggravating or mitigating factors in ABA Standard 9.0 not be present in Michigan standards? Are there any not present in the ABA Standards that should be set forth in Michigan standards?**

Minor revisions were made in this area. Commentary could help to address matters such as the relative weight to be given to various factors. These issues are discussed in the drafting notes to Standards 9.0 - 9.3.

**8. Are there differences between the ABA Standards and Michigan precedent? And, if so, how should such differences between be handled? That is, assuming the ABA Standards are used as a model, should certain standards be adjusted?**



**Or, should caselaw be revisited? What will be the role of the standards *vis a vis* precedent of the Board and the Court?**

There are a few differences between presumptive ranges of discipline recommended in the ABA Standards and those suggested by Michigan precedent. The attached blacklined version of the Michigan Standards and Drafting Notes highlight and explain the Board's modifications in these areas. Some of these were noted in the Introduction to this report, i.e., the recommended ABA sanctions for mishandling client property were somewhat less stringent in some respects than Michigan caselaw, and the standards for dishonest conduct were revised to reflect Michigan's presumption that dishonest conduct will lead to a suspension (as opposed to a reprimand) more often than the ABA Standards might suggest.

The Board wishes to stress that it considers the proposed Michigan Standards to be a work in progress, indefinitely. That is, the Board may not fully appreciate the nature or gravity of a particular type of misconduct, or the best way to articulate a generalization regarding such misconduct, until it is faced with a particular fact pattern. Thus does the common law accumulate and afford guidance. The outstanding contribution to be made by Michigan standards is accessibility to the law of discipline so that litigants and panels can approach the sanctions proceeding with a shared vocabulary, with notice of the pertinent factors, and with a general sense of the discipline imposed in like cases. To assure the continuing relevance and vitality of the Standards, the ADB proposes (as mentioned above) to draft extensive commentary where appropriate and retain caselaw as a critical, co-equal declaration of the appropriate level of discipline, at times fitting within the Standards thereby adding flesh to that structure, and perhaps, at times departing for articulated reasons and either retaining or amending the Standards in light of such a decision as may be warranted.

**9. Who should adopt and revise Michigan standards?**

The Michigan Supreme Court relies heavily on the ADB in disciplining members of our bar. Given that the Board already sets benchmarks for determining the appropriate level of discipline for various offenses, and will continue to do so in its role as an appellate tribunal interpreting and applying the standards, the Board respectfully seeks authority from the Court to adopt the attached proposed Michigan Standards and revise them as necessary. See Preface to the proposed Michigan Standards contemplating an order of the Court authorizing the Board to adopt and amend the standards from time to time, and providing that the Court "may at any time modify these standards or direct the Board to modify them."

## **V. Conclusion**

In conclusion, the ADB would like to observe that the ABA Joint Committee on Professional Sanctions deserves praise for early identification of the ills of unwarranted disparities in the imposition of lawyer discipline and for undertaking the enormous task of attempting to standardize the process of imposing sanctions by enunciating relevant factors and cataloguing their application in a broad yet useful fashion. Many of the criticisms which can be leveled at the Standards were likely apparent to the Joint Committee on Professional Sanctions but were accepted as the lesser of evils. Such calculations may be ripe for review in light of the 15 years of caselaw applying the Standards. Other problems may not have been apparent until various courts and agencies encountered particular cases that illuminated aspects of the Standards. But, the fact that the Standards arguably may be improved certainly does not diminish the contribution they have made.

The Attorney Discipline Board appreciates this opportunity to serve the Court as its adjudicative arm for lawyer discipline matters, and remains committed to pursue such further work in this area as the Court considers appropriate.